No. 13494

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA AIRLINES, INC., a Corporation,
*Appellant,*

vs.

ARTHUR W. STEPHENSON,
*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA—THIRD DIVISION

## BRIEF FOR APPELLANT


McCUTCHEON, NESBETT & RADER,
*Attorneys for Appellant.*

BUELL NESBETT,
HAROLD HARPER,
GERALD J. McMAHON,
*Of Counsel.*

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### Pleadings and Jurisdiction.

This is an appeal from a judgment entered on April 18, 1952, upon verdicts in favor of plaintiff, awarding him $11,050 on his first claim, and $2,695 on his second claim, with costs and attorneys' fees allowed by the Court (*73-75).

The cause was within the general jurisdiction of the Alaska District Court (48 USC, § 101, Alaska Compiled Laws Ann. 1949, § 53-1-1). Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 USC, §§ 1291 and 1294.

* References are to pages of the record unless otherwise indicated.

Appellee, as plaintiff, alleged in his first claim that he entered defendant's employ on September 22, 1950, at a wage of $1300 a month (3), taking a six-months' leave of absence from Western Airlines, Inc., to do so, said leave to expire on March 18, 1951; that prior to expiration of his leave, defendant, by the Chairman of its Board of Directors, R. W. Marshall, promised plaintiff a contract with defendant corporation for a period of not less than two years from March 15, 1951 to March 15, 1953, at a monthly salary of $1300 plus expenses while away from home; that plaintiff severed his connections with Western Airlines, Inc., at the request of defendant's Chairman, thereby losing rights of pay and tenure with that company (4-5); that plaintiff was discharged by defendant on September 15, 1951; that by reason of defendant's failure to complete its contract of employment, plaintiff was damaged in the sum of $22,100 (6-7).

In his second claim, plaintiff asked for $3,092.87 for travel expenses, wages unpaid, moving expenses and other costs alleged to have been incurred at the request of the Chairman of the Board (6).

In its answer, defendant admitted employing plaintiff, but at a salary of $1,000 a month plus traveling expenses, plus an additional sum of $300 per month until such time as plaintiff could move his family to Alaska (10); denied making a promise of a contract of employment for a fixed term, and alleged that on two separate occasions plaintiff, on his own initiative, traveled to New York from Alaska where he conferred with the Chairman of the Board, requested a contract of employment, and on each occasion, was refused (11).

Defendant denied plaintiff's second claim (12), and counterclaimed for $2,174.15 for funds wrongfully withdrawn by plaintiff while an officer of defendant (13-14). Defendant, by way of affirmative defense to both claims, pleaded the Statute of Frauds (12-13).

Plaintiff replied denying the counterclaim (14-15).

At the close of plaintiff's case, defendant moved for an instructed verdict, which was denied (30-31). The motion was renewed and denied at the close of the entire case (296).

At the close of the case defendant was permitted to plead additional affirmative defenses of (1) justifiable discharge based on plaintiff's refusal to account for corporate funds withdrawn by him, and (2) plaintiff's failure to attempt to find other employment so as to mitigate damages (36).

A motion for judgment notwithstanding the verdict was denied (69-71). Defendant's motion for a new trial (77-79) was denied (85-86).

## Statement of the Case.

In New York, in September of 1950, plaintiff was employed by Raymond W. Marshall, the Chairman of the Board of Directors of defendant, to act as General Manager of Alaska Airlines (121-2). The employment was admittedly on a month to month basis (122, 226). Plaintiff claims the salary was to be $1300 a month, plus traveling expenses, plus "additional expenses" connected with living in Alaska (122-124). Defendant claims the salary was to be $1000 a month, plus traveling expenses, plus an additional sum of $300 a month for only as long as plaintiff was required to maintain his home in Los Angeles (226).

Plaintiff was employed as a pilot by Western Airlines Inc., but obtained a six-months' leave of absence to accept employment with defendant (122).

Plaintiff entered upon his duties, and next met Marshall in New York about January 6, 1951 (126), at which time, plaintiff testifies, Marshall told him he could move his family to Alaska and defendant would pay all expenses (128). Plaintiff moved his family to Alaska (128).

Commencing in February of 1951 (158), plaintiff failed to submit regular expense vouchers in accordance with company practice. Plaintiff says he refused to submit the vouchers because defendant's accounting department failed to give him regular notice of credits approved on vouchers submitted prior to February, 1951 (158).

Plaintiff was discharged by defendant in August of 1951 (144). On September 19, 1951, plaintiff delivered to defendant a number of vouchers for the period from February to August (176), but did not submit vouchers in support of his claim for "moving and additional expense" (169). At the trial, it appeared that these "moving and additional expenses" for which company funds had been withdrawn covered such expense items as pay for a caretaker for his Los Angeles home, winter clothing for his family and, in particular, the sum of $2000 to make monthly payments on a home he had purchased in Anchorage (180-181, 184). Defendant contends that moneys expended for the purchase of a home (217) are not "moving expenses", even assuming that defendant did agree to pay such expenses.

Plaintiff's leave of absence with Western Airlines, Inc., expired on March 18, 1951 (129). On or about March 15, 1951, plaintiff traveled to New York from Alaska for the purpose of negotiating a contract of employment with defendant for a definite period (128). Plaintiff now contends that he succeeded in getting a promise from Marshall that defendant would employ plaintiff for two years at a salary of at least $1300 per month and execute a contract to that effect at a later date (130-131). Marshall testified that no promise of a contract for a definite salary for a definite period of time could or would be given until it was learned whether defendant would receive a certificated route from the Civil Aeronautics Board and, if so, what the route would be (227). Plaintiff allowed his leave with Western Airlines to expire (134) and claims to have

lost longevity rights and other valuable tenure advantages.

On or about April 7, 1951, plaintiff again went to New York and presented to Marshall a proposed employment contract in writing (137-140), this proposed contract being sharply at variance with the contract he claims to have been orally promised on March 16th or 17th, three weeks earlier. After ten days in New York, plaintiff returned to his duties (141). Admittedly, no written contract was signed or agreed upon during the April visit (141-2).

Defendant received a certificated route on May 24 or 25, 1951 (136), but plaintiff made no attempt to obtain a written contract (137).

Defendant terminated plaintiff's services on August 23, 1951 (144). Plaintiff was retained on the payroll, however, until October 15, 1951 (145, 335-6).

Plaintiff sues upon an alleged oral promise to execute a written contract for employment by defendant for a period of two years at a monthly salary of $1300 and, in a second claim, for wages and expense moneys due.

Plaintiff relies upon the doctrine of "promissory estoppel" to avoid the effect of the Statute of Frauds on the alleged oral promise.

## Specification of Errors.

### First Claim.

1. The evidence is insufficient to establish a contract between the parties, written or oral.

2. The alleged contract was within the Statute of Frauds, and defendant is not estopped to assert its invalidity upon that ground.

3. The evidence establishes that plaintiff had made no effort to mitigate damages and, therefore, any recovery for other than nominal damages was improper.

4. The verdict is contrary to the law and the evidence.

5. The trial court erred in denying defendant's motion for a directed verdict in favor of defendant as made at the close of plaintiff's case and as renewed at the close of all the evidence.

6. The trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

**Second Claim.**

1. Plaintiff failed to establish a contract with the defendant to reimburse him for installments paid in the purchase of real property in Anchorage, Alaska, in the aggregate amount of $2,000.00.

## POINT I.

**There was insufficient evidence to go to the jury that defendant had entered into an oral contract with plaintiff to employ him for two years.**

Plaintiff's first claim is based upon conversations had with Raymond W. Marshall, Chairman of defendant's Board of Directors (225). Plaintiff's evidence is his own unsupported testimony as to interviews with Marshall. His evidence is contradicted by Marshall in material respects (225-240). Since it must be presumed that the jury by its verdict preferred plaintiff's version to Marshall's, the latter's testimony will be disregarded and this point will deal only with the question whether plaintiff upon his own testimony established an oral contract.

Plaintiff testified as to four interviews with Marshall at defendant's office at 501 Fifth Avenue, New York, N. Y. On the first of these, on September 19, 1950, plaintiff says that he was employed at $1300 a month. While a contract

and increased salary were discussed, these matters were deferred. Presumably, the employment was from month to month (121-126). The next interview was on January 6, 1951. Plaintiff concedes that at its conclusion he had no agreement (127-128). The next interview was on March 16 or 17, 1951, or both. Plaintiff's 180-day leave from Western Airlines, by which he previously had been employed, was to expire on March 18th (129-134). It is plaintiff's contention that on this occasion on oral agreement was made for two years at his current salary of $1300 a month. A fourth interview or series of interviews was had between April 7 and 17, 1951 (137-144). Plaintiff admits that at these conferences he submitted a proposed contract in writing by which he sought to obtain better terms. Marshall refused to sign it.

On May 24, 1951, the Civil Aeronautics Board granted defendant a Certificate of Public Convenience and Necessity to operate a route from Portland and Seattle to Fairbanks (136). Prior to this grant of authority, defendant had been authorized to operate a scheduled service only between Alaska points. At all of the interviews with Marshall, the granting of this Certificate hung in the balance (123, 125, 126, 127, 128, 130, 131, 133, 134 and 142). Manifestly, the Certificate would effect a great change in the scope of defendant's operations and, therefore, in its permissible budget. At all four of the interviews the Certificate was mentioned as a critical factor determining plaintiff's future with defendant. The extent of the operation permitted by the Certificate, and the life of the Certificate itself, could not be known in advance. Defendant maintains that Marshall did not commit the company to a fixed-term employment contract, and was unwilling to do so unless and until a Certificate was granted, and the extent and terms thereof known; plaintiff contends that the granting of the Certificate was merely to be the occasion for reducing to writing an oral agreement for such a fixed-term contract made on March 16 or 17, 1951.

Plaintiff's assertion of an oral contract in March is highly improbable. On plaintiff's own testimony, Marshall had refused a written contract in September (122), had refused it in January (127), refused it in March when the oral contract is alleged to have been made (130), and refused it again in April (142). All of these refusals were upon the ground that the Certificate of Public Convenience and Necessity had not yet come down (122, 127, 130, 142). It is clear that in the minds of the parties the written contract and the fixed-term contract were equivalents. In view of the importance which the granting of the Certificate played in the negotiations, it is fatuous to suppose that Marshall in March was willing to commit the company to a two-year contract, and was merely unwilling to put the contract in writing until the Certificate was granted. Such an intention cannot be attributed to Marshall unless, indeed, he made the oral promise with tongue in cheek and the statute of frauds in mind. There is no such contention and no evidence upon which such a contention could be based.

The improbability reaches absurdity when the admitted fact is added that in April, less than three weeks after the oral agreement is alleged to have been made, plaintiff was back in New York presenting a written contract, not for two years, but for four, and not at $1300 a month, but at $18,000 a year ($1500 a month), to be increased to $23,000 when the certificate was granted, and that Marshall refused again to enter into a written contract (137-142). And further to cap the climax, when on May 24, 1951, the Certificate was granted, and thus the event had occurred upon which, according to plaintiff, the contract was to be reduced to writing, plaintiff did not renew his request for a formal contract (137) and never made any attempts to obtain one thereafter (143).

Not only is a March oral contract highly improbable, but the closest scrutiny of plaintiff's own testimony fails

to reveal any meeting of the minds. Plaintiff testified on direct examination (128-130):

"Q. All right, then; you removed your family to Alaska following January 6, 1951. Now, then, when was it that you next discussed the contract with Mr. Marshall or any officer of Alaska Airlines?

A. It was, I believe, the 16th of March. 16th or 17th—possibly both days.

Q. The 16th day of March of 1951, is that correct?

A. Yes; that's correct.

Q. Well, now, will you state the occasion for your discussion at that time?

A. I advised Mr. Marshall that my last day of leave was the 17th of March and that I would have to report to Western Airlines in person on the 18th or my employment with Western would be terminated.

Q. Now, where did this discussion take place?

A. In Mr. Marshall's office in New York.

Q. And who else was present?

A. There was no one else present.

Q. Well, did you advise Mr. Marshall anything further than that—was that the full text of your advice to him in this regard?

A. I believe so.

Q. Do you recall, is that substantially the language you used?

(Omitting irrelevant comment.)

A. And that I thought we should consummate and complete some sort of an agreement.

Q. What did Mr. Marshall tell you on this occasion?

A. I indicated to him that I thought I should have a contract for four years and that the increase in salary could be contingent upon the date we started operating from Alaska to Seattle.

Q. Did Mr. Marshall agree to that point, or what did he say?

A. He agreed that it was time a contract should be written but he was reluctant to do so until the certificate was issued."

No contract can be read into this conversation. Plaintiff has "some sort of an agreement" in mind, but defendant's officer is reluctant to enter into a contract until a certificate is issued.

Still on direct examination, plaintiff testified (131-133):

> "A. My principal concern at that time, and I expressed it to Mr. Marshall, was that I must be back in Los Angeles on the 18th or forfeit my rights with Western Airlines, and I remember once telling him that I better make up my mind—we better make up our minds—where I was going tomorrow; whether I was going to Anchorage or Los Angeles, and he again assured me—he said 'Let's go along and we'll get a contract worked up when we get this certificate.' We discussed many items, minor items of operation in Seattle and Anchorage, and intermittently interspersed our conversation with discussions about a long term agreement with me.
>
> Q. Now, did you at that time offer a memorandum agreement to Mr. Marshall?
>
> A. I offered him a memorandum of—it wasn't in agreement form; it was simply four or five paragraphs stating the things that I thought should be incorporated into an agreement.
>
> Q. Do you have that instrument with you?
>
> A. No, I do not.
>
> Q. Do you know what happened to it?
>
> A. I left a copy of it with Mr. Marshall and my copy I have lost or misplaced somewhere.
>
> Q. Well, do you recall the text of the memorandum?
>
> A. The text of the memorandum pertained—one or two paragraphs pertained to the method of operation, the division of responsibility, and the assignment of functions to the Alaska office of Alaska Airlines—to their Anchorage Office—and I had stated in my memorandum that I thought there should be a four year written agreement and I did not press the salary increase at that time until a certificate—an increase in salary when the certificate was granted.

Q. Did you set forth a salary in your memorandum?

A. Yes; I asked that I be at least paid $18,000.00 a year over the $15,300.00 that I was being paid.

Q. I didn't understand that; would you just repeat that again?

A. I insisted that it be that much of an increase when the certificate was issued.

Q. The difference between what figures?

A. Fifteen three and eighteen thousand.

Q. Is that the figure that you were being paid, at the first figure, fifteen three?

A. That's right.

Q. Well, now, do you recall Mr. Marshall's statements in regard to this instrument when you delivered it to him?

A. His statement was that he didn't—that now wasn't the time to complete an agreement; we would still wait until we got the certificate and knew what we had, what size the operation would be, where I might live. The thinking was that if we got a certificate to the States we could operate out of Seattle rather than Anchorage."

Still no promise to contract on definite terms. No term was mentioned by plaintiff, and there is question as to what salary he wanted. But there is no doubt as to Marshall's attitude that "now wasn't the time to complete an agreement; we would still wait until we got the Certificate and knew what we had."

Again on direct examination (134):

"Q. Well, what did Mr. Marshall advise you to do, if anything?

A. He advised me to go on back to Anchorage and when we get this certificate and get squared away, why, we will make a satisfactory agreement."

By plaintiff's own testimony Marshall would not make a promise, other than to make a "satisfactory agreement" when the certificate issued and they have squared away.

Moreover, an analysis of plaintiff's testimony shows that in the critical interview of March 16th or 17th, as reported by him, the essential elements of a contract were not present.

**(1) Duration of the employment.**

Following is all of the testimony as to the period of the contract (130):

> "Q. Well, did Mr. Marshall make any representations to you as to what the agreement was going to be?
>
> A. Well, my idea of it was that it should be for four years and he thought that would be a little too long, or too long, and that possibly two years would be agreeable, but that he didn't want to do that until the certificate was issued.
>
> Q. Well, did you agree on two years?
>
> A. Yes; it would have been satisfactory to me at that time to have done it that way.
>
> Q. Well, did the two of you agree on a contract at that time, or a term?
>
> A. I conceded that point to him."

At that interview, plaintiff presented a memorandum of matters that he wished incorporated into a written agreement. The period of employment was put down as four years, not two, and the salary at $18,000, not $1,300 a month or $15,600 (132). Plaintiff testified (133):

> "Q. Well, did Mr. Marshall take issue with your memorandum agreement as to salary?
>
> A. No, he did not.
>
> Q. Did he take issue with it as to time, duration?
>
> A. He suggested—indicated that two years would be a much better arrangement for him, he thought, than four."

It is clear that with reference to the period of employment, as well as to the amount of salary, Marshall was speaking of what might be done after the Certificate was

granted, and was not referring to a contract presently binding.

**(2) Date when the period of employment was to commence.**

Despite the fact that all of the conversation appears to have been prospective and to have been related to what might be done after the certificate was granted, plaintiff's theory forces him to the position that the two years was to commence immediately and so alleges in his complaint (5-6). There was no evidence as to when the fixed period of employment should commence.

**(3) Amount of salary.**

The memorandum which plaintiff presented at the March meeting called for $18,000 (132). Plaintiff testified on cross-examination (276):

> "Q. Is it your testimony that you two agreed at that time that you were to be employed for two years at $1,300.00 per month?
>
> A. That was the salary at that time and there was no particular argument about changing the salary until we got a certificate."

**(4) Consideration.**

There was no consideration for defendant's alleged agreement to employ plaintiff for two years unless it was plaintiff's reciprocal promise to work for defendant for two years. Indeed, the Court charged that the verdict upon this claim must be for defendant unless the jury found "that the plaintiff at the same time promised to work for the defendant for the period of two years and for a minimum salary of $1,300.00 a month, which might be increased by agreement of the parties after the issuance of the desired certificate to the defendant" (310).

There was no evidence whatever upon which the jury could have so found. Plaintiff nowhere testified that he,

in March or any other time, had committed himself to work for defendant for two years or for any period, and certainly nowhere that he had agreed to work for $1300 a month after the Certificate was issued. The jury could not have inferred such a promise from thin air. Indeed, such an inference is hardly permissible in view of the fact that when in April, only three weeks later, plaintiff submitted to Marshall a formal written contract which he had had prepared and to which he asked Marshall's signature, there was no provision whereby plaintiff bound himself for two years or four years or for any period (138-140).

Thus, neither as to term of employment, salary or consideration is plaintiff's version of the March conversation sufficiently definite to constitute an enforceable contract. The lack of these essential elements in plaintiff's own testimony, plus the improbability that Marshall intended to or did commit the company to a fixed-term high-salary contract prior to the granting of the Certificate of Public Convenience and Necessity, are so strongly indicative that there was no such contract that the Court erred in submitting the question to the jury.

## POINT II.

### The alleged contract was within the Statute of Frauds and defendant is not estopped to assert its invalidity upon that ground.

#### A. The applicable law is that of New York where the contract was made.

Plaintiff alleges that defendant did "promise this plaintiff a contract with the Alaska Airlines, Inc. for a period of not less than two years from March 15, 1951 to March 15, 1953, * * *" (4-5).

The contract was one which by its terms was not to be performed within one year from the making thereof. Hence,

the contract was invalid whether the applicable law was Alaska statutes § 58-2-2, or § 31 of the New York Personal Property Law, the provisions being substantially identical.

The Conflict of Laws Restatement provides:

> "§ 334. Formalities for Contracting.
>
> The law of the place of contracting determines the formalities required for making a contract.
>
> Comment:
>
> a. The law of the place of contracting determines whether the contract must be in writing in order to be valid."

The conference between plaintiff and Marshall on March 16 or 17, 1951, at which the oral contract is alleged to have been reached, took place at 501 Fifth Avenue, in the Borough of Manhattan, City of New York, as, indeed, did all of the other conferences relating to plaintiff's employment. Hence, New York was the place of contracting and New York law applies.

The New York Personal Property Law provides:

> "§ 31. Agreements required to be in writing
>
> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime; * * * "

**B. Under New York law, an oral agreement to enter into a subsequent written agreement is within the statute.**

In *Newkirk* v. *Bradley & Son* (4th Dept. 1947), 271 App. Div. 658, 67 N. Y. S. 2d 459, 461, the Court said, per Larkin, J. (p. 660):

"We are not impressed by plaintiff's argument that, since defendant's promise was to execute a written contract granting him the exclusive sales agency, thereby a completed contract breached by defendant is pleaded. On the contrary, we conclude that defendant's alleged promise to reduce this agency contract to writing adds nothing to the enforcibility of the agreement (*McLachlin* v. *Village of Whitehall,* 114 App. Div 315, 99 N. Y. S. 721; *McLachlin* v. *Village of Whitehall,* 121 App. Div. 903, affd. 194 N. Y. 578, 88 N. E. 1124; *Deutsch* v. *Textile Waste Merchandising Co.,* 212 App. Div. 681, 684, 209 N. Y. S. 388; *Theiss* v. *McRae,* 260 App. Div. 882, 23 N. Y. S. 2d 2; *Subirana* v. *Munds,* 282 N. Y. 726, 26 N. E. 2d 828; 2 Williston on Contracts [Rev. ed.], § 524A, p. 1512; Browne on Statute of Frauds [5th ed.], § 284, p. 376)."

**C. Under New York law, the defendant in this case cannot be estopped from asserting the defense of the Statute of Frauds.**

Promissory estoppel has not been recognized in New York, save as a substitute for consideration in agreements to make charitable contributions. Except in this limited area, it is essential to estoppel that there be a representation of existing fact and a reliance by the other party to his detriment upon that representation.

*Kahn* v. *Cecelia Co.* (S. D. N. Y. 1941), 40 F. Supp. 878, arose upon a motion to dismiss the complaint for failure to state a claim. The Court, Coxe, D. J. said (pp. 879-880):

"The sole ground urged by the plaintiff to sustain the first cause of action is that the defendant is estopped to interpose the Statute of Frauds as a defense. Personal Property Law N. Y. § 31. This is a clear recognition that the cause of action cannot stand if the allegations in support of the estoppel are insufficient. These allegations are criticised by the defendant as mere conclusions. I prefer, however, not to take that ground, as I do not believe that

'promissory estoppel', on which the plaintiff relies, has any application to the case under New York law.

"The doctrine of 'promissory estoppel' is of comparatively recent origin, and has usually been resorted to as a substitute for consideration. Williston on Contracts, Rev. Ed., § 139; Restatement of Contracts, § 90; Porter v. Commissioner of Internal Revenue, 2 Cir., 60 F. 2d 673, 675. In New York it has received a limited application 'as the equivalent of consideration' in cases involving charitable subscriptions. Allegheny College v. National Chatauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173, 175, 57 A. L. R. 980. The doctrine has been extended in some jurisdictions to cases similar to the one at bar. Williston on Contracts, Rev. Ed., § 533-A; Restatement of Contracts, § 178, comment (f). But this extension has found no support in New York. White v. Ashton, 51 N. Y. 280.

"The case is not unlike McLachlin v. Village of Whitehall, 114 App. Div. 315, 99 N. Y. S. 721, even though the form of the action is different. In that case there was a strong showing that the plaintiff had made a large outlay in reliance on an oral promise of the defendant to enter into a written contract, yet the court held that there could be no recovery. It is true that the action was for breach of the oral promise, but I do not believe that the result would have been otherwise even if the action had taken the present form. The real basis for the decision was that the court was not willing to permit the 'practical nullification of the statute of frauds' (p. 318 of 114 App. Div., p. 723 of 99 N. Y. S.). A similar ruling was made in Deutsch v. Textile Waste Merchandising Co., 212 App. Div. 681, 209 N. Y. S. 388."

In New York only a representation of fact will support an estoppel. A mere promise will not do so. In *White* v. *Ashton* (1873), 51 N. Y. 280, defendants' bill of lading did not specify the route which the schooner was to take. Plaintiff claimed that defendants had promised him that the

vessel would take the inside route and, in reliance thereon, he had insured his shipment of barley for that route. The vessel took another route, the shipment was lost, and plaintiff's insurance was not available. The Court held that the parole evidence rule applied, and that defendants could not be estopped to assert that the alleged promise to take the insured route was not part of the written contract. The Court denied a recovery and said, per HUNT, C. (p. 285):

> "Here was a promise simply to do a given thing, allowing the utmost force to the evidence and the offers, to wit, to transport the goods by the inner route. There was no assertion of an existing fact, the truth of which the party now wishes to disprove. He failed to perform his verbal agreement. Is there any case which, upon the principle of estoppel, will prohibit his taking advantage of the rule that this agreement was merged in the writing?"

In *Newkirk* v. *Bradley & Son* (4th Dept. 1947), 271 App. Div. 658, 67 N. Y. S. 2d 459, 462, the Court said, per LARKIN, J. (p. 660):

> "We do not believe that the rule expressed in Restatement of Contracts (§ 178, comment f, p. 235) that an estoppel may arise to preclude the plea of the statute because of plaintiff's reliance on defendant's promise to give him a written agency contract, is applicable. Even though defendant's refusal so to perform may be unconscionable and may result in injury to plaintiff, still a mere refusal to perform, in the absence of fraud, seems not enough, in New York, to justify disregarding the statute (*Bulkley* v. *Shaw*, 289 N. Y. 133, 139, 44 N. E. 2d 398; *Kahn* v. *Cecelia Co.*, 40 F. Supp. 878)."

The Court below recognized that the *lex loci contractus* rule should be applied in the instant case (204), but considered that it could not rule out the doctrine of promissory estoppel because "neither the Appellate Division of the Supreme Court of New York nor the Court of Appeals of

New York has ruled directly upon the exact problem with which we are confronted here" (205).

However, the New York cases which have dealt with partial performance by plaintiff as a ground for denying the application of the statute of frauds, give a clear answer so far as the New York Court of Appeals is concerned. All of these cases of partial performance include the element of steps taken to plaintiff's disadvantage in alleged reliance on the oral promise. Uniformly these cases require, not only that plaintiff's acts in reliance on the oral promise shall have been to his damage, but also that those acts shall themselves evidence the oral promise. As far back as *Phillips* v. *Thompson* (1814), 1 John. Ch. 131, Chancellor KENT said (p. 149):

> "It is not sufficient that the entry and use of the land is evidence of some agreement. It must be satisfactory evidence of the particular agreement charged, or it will not take the case out of the statute."

There is a view that the avoidance of the statute by a partial performance should logically be grounded upon estoppel, and not upon the proposition that the partial performance is corroborative evidence of the oral contract. 75 A. L. R. 651, Note. However this may be, it is nevertheless clear that in New York the partial performance that will take the case out of the statute must be "solely and unequivocally referable" to the contract.

As was said by COLLIN, J., in *Woolley* v. *Stewart* (1918), 222 N. Y. 347, 351, 118 N. E. 847, 848:

> "The acts must, however, be so clear, certain, and definite in their object and design as to refer to a complete and perfect agreement of which they are a part execution—must be unequivocal in their character and must have reference to the carrying out of the agreement."

In the recent case of *Roberts* v. *Fulmer* (1950), 301 N. Y. 277, 93 N. E. 2d 846, 849, a suit for the specific performance of an oral agreement to convey a farm, plaintiff had surrendered a factory job and, with his wife and children moved to the farm and proceeded to work it, making a contract for the re-siding of the farmhouse at a cost of $800, payable in thirty-six monthly installments. Since, as the prevailing opinion states (p. 281), the parties and the Courts below agreed on what the law was, but differed only as to its application, we take the restatement of the law from the dissenting opinion because it is somewhat more full (p. 285):

> "Fuld, J. (dissenting). I start with the premise—for we are all agreed on the proposition—that not every act of part performance is sufficient to take an oral contract for the sale of real property out of the statute of frauds (Real Property Law, § 259). If equity is to enforce such an oral agreement, it requires assurance, positive and unequivocal, from the acts performed, that 'The peril of perjury and error * * * latent in the spoken promise' is avoided. (*Burns* v. *McCormick,* 233 N. Y. 230, 234, 135 N. E. 273, 274.) Accordingly, the principle is firmly established that part performance 'must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done.' (*Burns* v. *McCormick, supra,* 233 N. Y., at p. 232, 135 N. E. 273.) In other words, part performance, alone and without relation to the oral promise, must be 'solely and unequivocally referable' to an agreement of purchase and sale, 'unintelligible or at least extraordinary unless as an incident of ownership'; if it is not, the promise may not be enforced. (See *Neverman* v. *Neverman,* 254 N. Y. 496, 500, 173 N. E. 838, 839; *Burns* v. *McCormick, supra,* 233 N. Y. 230, 232, 234-235, 135 N. E. 273, 274; *Woolley* v. *Stewart,* 222 N. Y. 347, 351, 118 N. E. 847, 848.)"

By a four to three vote the Court of Appeals held (p. 284):

> "When viewed against the whole record, then, we hold that the acts and conduct of the plaintiff constituted part performance 'solely and unequivocally referable' to the contract within our established rule (*Woolley* v. *Stewart, supra; Burns* v. *McCormick, supra,* p. 234; *Neverman* v. *Neverman, supra;* Real Property Law, § 270)."

Clearly, it is not necessary to go further than this case to determine how the New York Court of Appeals would decide the instant case. If all that was necessary to avoid the operation of the statute of frauds was for plaintiff to have relinquished rights or suffered prejudice in reliance on the oral promise, the case of *Roberts* v. *Fulmer* could have been decided upon that ground, and decided unanimously, without inquiry whether the acts and conduct of the plaintiff constituted part performance "solely and unequivocally referable to the contract."

Furthermore, the doctrine of partial performance, even to the limited extent that the New York Court of Appeals accepts it, has been confined to cases where the oral contract is invalid under § 259 of the Real Property Law, relating to sales of real property. Under that section the Statute of Frauds is unavailable as a defense if plaintiff has partially performed the contract and that performance is "solely and unequivocably referable to the contract." *Woolley* v. *Stewart* (1918), 222 N. Y. 347, 118 N. E. 847; *Burns* v. *McCormick* (1922), 233 N. Y. 230, 135 N. E. 273; *Neverman* v. *Neverman* (1930), 254 N. Y. 496, 173 N. E. 838; *Roberts* v. *Fulmer* (1950), 301 N. Y. 277, 93 N. E. 2d 846. *Wikiosco, Inc.* v. *Proller* (3d Dept. 1949), 276 App. Div. 239, 94 N. Y. S. 2d 645, while it uses the language of estoppel, arose under § 259, and was a case of complete performance on the part of plaintiff.

On the contrary, in the case of § 31 of the Personal Property Law, a contract not to be performed within the year, partial performance will not serve. Nothing short of

full performance by both parties will take such a contract out of the operation of the statute. *Bayreuther* v. *Reinisch* (1st Dept. 1942), 264 App. Div. 138, 34 N. Y. S. 2d 674, aff'd 290 N. Y. 553, 47 N. E. 2d 959; *Wahl* v. *Barnum* (1889), 116 N. Y. 87, 98, 22 N. E. 280; *Tyler* v. *Windels* (1st Dept. 1919), 186 App. Div. 698, 174 N. Y. S. 762, aff'd (1919), 227 N. Y. 589, 125 N. E. 926; *Deutsch* v. *Textile Waste Merchandising Co.* (1st Dept. 1925), 212 App. Div. 681, 209 N. Y. S. 388.

Thus, in *McLachlin* v. *Village of Whitehall* (3d Dept. 1906), 114 App. Div. 315, 99 N. Y. S. 721, the Court reversed a judgment upon a jury's verdict and denied recovery upon an oral agreement to enter into a written contract to light the village for five years, although plaintiff claimed that in pursuance of the oral agreement made with the village trustees he had expended $8,000 to $10,000 in installing an incandescent lighting system.

In *Deutsch* v. *Textile Waste Merchandising Co.* (1st Dept. 1925), 212 App. Div. 681, 209 N. Y. S. 388, the Court upon affidavits dismissed a complaint in a case in which defendant claimed an oral contract to give plaintiff a written contract of employment for five years. This was done although the complaint alleged that plaintiff, relying on defendant's promise, had given defendant the benefit of all of his trade secrets, a large volume of business and had lost the opportunity of making other connections in the trade.

It is clear, therefore, that, however viewed, the New York Statute of Frauds is a bar to plaintiff's recovery.

**D. Even if the doctrine of promissory estoppel applies, plaintiff has not brought himself within it.**

Manifestly, to permit recovery upon an oral agreement upon any ground is to deprive defendant of the protection intended by the statute. As was said in *Kroger* v. *Baur* (2d Dist. 1941), 46 Cal. App. 2d 801, 117 P. 2d 50, 52:

> "Without the protection of the statute, the defendant is called upon to meet the bald assertion of a promise

to which he can interpose nothing but his simple denial."

Therefore, even in those cases in which it has been recognized that plaintiff may enforce an oral promise because defendant is estopped to assert the statute, the Courts have proceeded with great caution. In *Albany Peanut Co.* v. *Euclid Candy Co.* (1st Dist. 1938), 30 Cal. App. 2d 35, 38, 85 P. 2d 471, 472, the Court said:

> "Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations.
> "The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and, unless the words and conduct of the party sought to be held amount to an inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds, there is an absence of fraud which is requisite to an estoppel."

This language has several times been quoted, both in the *Kroger* case and elsewhere. In the *Albany Peanut* case, the Court continued (p. 473):

> "A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party."

"Reasonable certainty" as to the terms of the oral contract would seem a minimum requirement in view of the fact that defendant is being deprived of the statutory protection. In the instant case, it cannot possibly be said that the terms of the contract were proved with reasonable certainty. Plaintiff's testimony was uncertain and indefinite as to the terms of the alleged contract and, indeed, left entirely open the question whether any agreement was reached at all. In fact, plaintiff's version of what occurred in March did not differ materially from what occurred in September, January and April. In each instance, plaintiff sought a contract; in each instance, plaintiff was told that no commitment could be made until the certificate to operate out of Portland and Seattle was granted.

Furthermore, under the doctrine of the *Albany Peanut* case, mere reliance on an oral promise is not sufficient to create the estoppel. Defendant must have induced plaintiff to waive a written contract and represented that it did not intend to avail itself of the statute. There is no evidence whatever that in the instant case the defendant represented to plaintiff that he would not need a written contract, or that the parties could get along without one.

Perhaps the most recent case in which equitable estoppel has been invoked to prevent a party to an oral agreement from relying upon the statute of frauds is *Federal Land Bank of Omaha* v. *Matson* (1942), 68 So. Dak. 538, 5 N. W. 2d 314. In that case the Court said, per Smith, J. (p. 315):

> "This court is committed to the view that the doctrine of equitable estoppel may prevent a party to an oral agreement from invoking the Statute of Frauds. Rogers v. Standard Life Ins. Co., 54 S. D. 107, 222 N. W. 667; Lampert Lumber Co. v. Pexa, 44 S. D. 382, 184 N. W. 207. The elements of proof which invoke an estoppel in such case are three, namely, (a) *the oral agreement must be established by satisfactory evidence;* (b) the party asserting

> rights under the agreement must have relied thereon and have indicated such reliance by *the performance of acts unequivocably referable to the agreement;* and (c) it must appear that because of his change of position in reliance on the agreement, to enforce the statute will subject such party to unconscionable hardship and loss. Vogel v. Shaw, 42 Wyo. 333, 294 P. 687, 75 A. L. R. 639; 78 Univ. of Pa. Law Review 51." (Emphasis ours.)

In the case at bar the evidence to establish the oral agreement was anything but "satisfactory". Furthermore, this opinion indicates that, whether the problem is approached from the point of view of partial performance of the oral contract or estoppel to insist upon a writing, the requirement is the same, to wit: that the plaintiff not only must have suffered damage in reliance upon the oral promise, but that reliance must be "by the performance of acts unequivocably referable to the agreement."

It is, no doubt, true in the instant case that in order for plaintiff to continue in defendant's employ it was necessary for him to give up his job with Western Airlines. On the other hand, his leaving that employment and foregoing whatever rights may have accrued to him under Western Airlines' contract with the Airline Pilots Association is not necessarily referable to plaintiff's alleged contract for the fixed term of two years. They are equally referable to continuation of an employment at will. The circumstances of plaintiff's age—the fact that he could not look forward to any very long period of service as a pilot—his acceptance of executive positions from time to time on leaves of absence from Western (120), all would tend to indicate that he may well have given up the employment with Western, not in reliance on a fixed-term contract, but merely with the expectation that he would be able to make good with defendant which, indeed, had made him a vice-president (152).

Thus, whether the reason for putting the statute to one side is "partial performance", or whether it is "promissory estoppel", and whether the law applied is that of New York or of some less exacting jurisdiction, plaintiff's voluntary surrender of his rights with Western Airlines under the pilots' union contract was not such act or conduct on his part as justifies disregard of the requirement of the statute, which concededly otherwise would cover this case.

## POINT III.

**The evidence establishes that plaintiff made no effort to mitigate damages and, therefore, any recovery for other than nominal damages was improper.**

Defendant introduced no evidence to the issue of plaintiff's willingness to seek other employment or his ability to get it. However, plaintiff's own testimony was such as to indicate both that he could have had other employment and that he did not choose to seek it. Apart from his experience as a pilot, to which plaintiff frequently referred, he had had ample experience as an executive. He had been an organizer of National Parks Airways and a vice-president in charge of its operations. He had been division superintendent of Western Airlines at Salt Lake City, Utah. While in Western's employ he had been granted leaves of absence to organize and reinstate Inland Airways, and he helped Seaport Airlines prepare its application for a Civil Aeronautics Board certificate. Most significantly, when he returned to Western after active duty in the Air Force, he had been given his choice of flying or taking an executive position (120).

The Court will take notice of the rapid expansion of commercial air services during the period in question and still continuing. Plaintiff's severance from defendant was under

circumstances which fully preserved his dignity and need not have mitigated against him (223).

Yet plaintiff chose to do nothing whatever and made no effort to secure employment (210). The very legalistic nature of his excuses: (1) that he had not been advised that he was no longer an officer of Alaska Airlines (substantially untrue, 143, 223); and (2) that the taking of an executive position in another airline might result in a violation of the Civil Aeronautics Act, indicates that he had no intention of mitigating damages (210-211).

In *Ransome Concrete Machinery Co.* v. *Moody* (2 C. A. 1922), 282 F. 29, the Court in affirming in a *per curiam* opinion the decision of Judge Hough below, approved his opinion, which said (p. 36):

> "But the sentence above quoted from the Boyd case (which is itself but a quotation from Sedgwick on Damages) does not infringe upon the rule that it is incumbent upon the discharged employee to exercise reasonable diligence in seeking other employment; nor does it mean that the evidence moving the court must be introduced by the employer. Any party who takes the witness stand may, and often does, give evidence unfavorable to some branches of his own contention."

(The reference to the "Boyd Case" is to a decision in this circuit, *American China Development Co.* v. *Boyd* (C. C. N. D. Cal. 1906), 148 F. 258.)

In this case it may truly be said that plaintiff on the witness stand has given sufficient evidence that upon the severance of his relationship with defendant he could have secured other employment and made no effort to do so. Hence, a verdict for more than nominal damages was unwarranted.

## POINT IV.

**There was no evidence upon which the jury might have determined that installments paid by plaintiff upon the purchase of a home were chargeable to defendant.**

Plaintiff exercised his control of defendant's affairs at Anchorage to withdraw substantial sums from the company's accounts. The total amount received by him during his management of defendant's business at Anchorage, other than salary payments, amounted to $10,075.21 (290). It was plaintiff's failure promptly to submit vouchers in support of these withdrawals which led to the disagreement between him and Marshall and his relief from duties on August 22, 1951 (332-336). Some of plaintiff's claimed credits were not asserted until the trial, but ultimately defendant's accounting department allowed a credit of $7,901.06 (290), leaving a balance of $2,174.15, which was the amount demanded in defendant's counterclaim as amended at the trial (13, 305).

The second claim in the complaint was likewise amended at the trial to demand $3,092.87, of which $2,695.20 was a claim for "Wages accrued and not paid to October 15, 1951" (6, 305).

The jury found a verdict for plaintiff in the exact amount of this wage claim, $2,695.20 (330), and no verdict on the counterclaim.

Not only did the jury render no verdict on the counterclaim, but it disregarded additional items of expense claimed by plaintiff in his second cause of action: "travel expenses $218.36", "moving expenses $179.31" (6, 305). If the jury had taken the view that plaintiff's contentions as to his expense account were right and defendant's wrong it should have allowed these items also. Its failure to do so, or to render any verdict at all on the counterclaim,

rather indicates that the jury was inclined to hold itself aloof from unraveling this complicated expense account.

Defendant would be glad to follow the jury's example and relieve this Court of any obligation of examining any item of the account. However, since defendant's statement of account upon which its counterclaim was based credited plaintiff with unpaid salary (probably less deductions) in the amount of $1,932.60 (289), the jury has in effect allowed plaintiff credits to offset all of his withdrawals from defendant's funds, or $10,075.21, plus $2,695.20.

One of these credits which the jury has so allowed is so fantastic and so foreign to any fiduciary's expense account that defendant cannot let it pass on this appeal. Plaintiff, under the heading "Excess costs in Anchorage to October 15, 1951, $2,165.25", actually charged defendant for payments of $250 per month for eight months paid upon a contract for the purchase of a home for himself at Anchorage (217).

Plaintiff's explanation of the theory of this charge was that the purchase contract provided that if he should not complete his purchase the installments paid should stand as rent (217), though he conceded that if he should sell the house for as much as the purchase price, he would be completely reimbursed (218). Plaintiff was still residing in Anchorage and presumably in the house at the time of the trial.

The Court charged (313):

> "Before you can find that the plaintiff is entitled to charge against the defendant the cost of making payments for the purchase of a home, or the rental of a dwelling house or the cost of purchase of clothes for his family, or the hire of a car to locate an apartment, you must find that the defendant agreed that such expenses would be paid by the defendant."

Any finding that defendant obligated itself to pay plaintiff's living expenses in excess of his salary is based upon

testimony of plaintiff of the most vague and general character (123, 128, 167-8, 192, 212-3, 216, 269). Certainly, there is no evidence anywhere in the record upon which the jury could possibly have found that defendant had agreed to buy plaintiff a home. Accordingly, there is no evidence upon which the jury, following the Court's correct instructions, could have found a verdict that plaintiff was entitled to a contribution of $2,000 from defendant for the purchase of his residence in Anchorage. Yet that is clearly what the jury has done. Manifestly, the verdict upon plaintiff's second claim must be reduced by $2,000.

## Conclusion.

There was no evidence upon which the jury could have found a contract, written or oral. Even if an oral contract could be spelled out from plaintiff's account of the March meeting, such a contract was barred by the statute of frauds, and under the applicable law defendant was not precluded from asserting that defense. At all events, only nominal damages should be found upon the first claim since plaintiff, upon his own testimony, wilfully refrained from seeking employment open to him in the air industry.

The effect of the jury's verdict on the second claim, and of its failure to render a verdict on the counterclaim, is that defendant has been required to contribute to the purchase of a home for plaintiff in Anchorage. There is no evidence that defendant ever made so extravagant a promise.

Since defendant does not choose to burden the Court with inquiry into the items of the controverted expense account, the verdict on the second claim must be permitted to stand, but only to the extent of $695.20, the amount by which plaintiff's claim for unpaid salary, $2,695.20, exceeds $2,000, the amount which plaintiff withdrew from defendant's bank account for the purchase of real estate.

In view of the disparity between the amount claimed and the amount to which plaintiff is entitled, no counsel fee should be allowed. The judgment should be modified by a reduction thereof to $695.20 and, as so modified, affirmed.

Dated, Anchorage, Alaska, Feb. 28, 1953.

McCutcheon, Nesbett & Rader,
*Attorneys for Defendant-Appellant.*

Buell Nesbett,
Harold Harper,
Gerald J. McMahon,
*Of Counsel.*